

FCC MAIL SECTION

Federal Communications Commission

DA 99-820

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Before the
DISPATCHED BY Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 99-141
Table of Allotments,)	RM-9339
FM Broadcast Stations.)	
(Monticello, Arkansas, and)	
Bastrop, Louisiana))	

NOTICE OF PROPOSED RULE MAKING
AND ORDER TO SHOW CAUSE

Adopted: April 21, 1999

Released: April 30, 1999

Comment Date: June 21, 1999

Reply Comment Date: July 6, 1999

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Midway Broadcasting Company ("petitioner"), licensee of Station KHBM-FM, Monticello, Arkansas, requesting the substitution of Channel 229C2 for Channel 229C3 at Monticello and modification of its authorization accordingly.¹ Additionally, in order to accommodate the modification, petitioner requests the substitution of Channel 230A for vacant Channel 230C3 at Bastrop, Louisiana, as well as a modification of the license for Station KTRY-FM, Bastrop, currently operating on Channel 232A, to specify operation on Channel 230A at that community.²

¹Commission records reveal the pendency of an application for the voluntary transfer of Station KHBM-FM to Community Radio Network, Inc. ("Community") (File No. BALH-990329GK). Therefore, comments in response to the Notice should include a statement from Community indicating its continuing interest in pursuing the modification proposal initiated by the petitioner.

²Although Station KTRY-FM currently operates on Channel 232A at Bastrop, it was modified in the context of MM Docket No. 87-242 to specify operation on Channel 230C2. The modification action was vacated in MM Docket No. 84-231, 5 FCC Rcd 931 (1990), but was reinstated in the Third Report and Order, in that proceeding, 7 FCC Rcd 470 (1992). Thereafter, as a result of the grant of its one-step application, a construction permit was issued to Station KTRY-FM to implement an upgrade on Channel 230C3 in lieu of Channel 230C2 (File No. BPH-940727ID). The construction permit expired on April 24, 1996, and the authorization was subsequently cancelled on August 21, 1996. A petition for reconsideration of the cancellation was denied December 3, 1998. The action cancelling the construction permit did not modify the underlying license of Station KTRY-FM to specify its operation on Channel 230A in lieu of Channel 232A at Bastrop. Therefore Channel 230C3 and Channel 232A both remain protected in the Commission's data base and appear in 47 CFR § 73.202, the FM Table of Allotments. It has never been the Commission's intention to permit a licensee to remain on a previously authorized channel in perpetuity. Therefore, in view of the final action modifying Station KTRY-FM, the licensee must vacate Channel

(continued...)

As an additional option, petitioner suggests that the placement of a site restriction on vacant Channel 230C3 at Bastrop would enable it to pursue its modification plans at Monticello while preserving the Channel 230C3 allotment. Petitioner stated its intention to apply for Channel 229C2 if it is allotted to Monticello, as requested.

2. In support of its proposal petitioner advises that it is precluded from pursuing its modification by filing a one-step application due to the existence of Channel 230C3 at Bastrop. Further, petitioner advises that the FM Table of Allotments reflects that Channels 230C3 and 232A are both allotted to Bastrop. In this instance, unless Channel 230C3 is site restricted, it prevents the petitioner from achieving an upgrade on Channel 229C2 at Monticello, Arkansas. The distance between petitioner's specified site for Channel 229C2 at Monticello at coordinates 33-43-44 and 91-34-02 and vacant Channel 230C3 at Bastrop, Louisiana, is 103.8 kilometers (64.3 miles), whereas a distance of 117 kilometers (73 miles) is required between first adjacent Class C2-C3 channels. To eliminate the short spacing deficiency, petitioner suggests the placement of a site restriction on Channel 230C3 at a location 7.1 kilometers (4.4 miles) southwest of Bastrop at coordinates 32-43-25 and 91-56-56. Alternatively, petitioner advises that if the Channel 230C3 allotment is downgraded to Channel 230A, it could be utilized at the licensed site of Station KTRY-FM at coordinates 32-49-10 and 91-54-29. Petitioner adds that in the event Station KTRY-FM is modified to Channel 230A, it is willing to reimburse the licensee for its reasonable costs associated with the channel change, if the Commission finds it is required to do so. Accordingly, petitioner requests the issuance of an Order to Show Cause to the licensee of Station KTRY-FM.

3. In further support of its proposal, petitioner advises that its modification request would enable Station KHBM-FM to provide 1.0 mV/m service to 71,651 persons in an area comprising 8,559.5 square kilometers, representing an increase of 17,522 persons in 3,789.4 square kilometers over its authorized Class C3 facility at Monticello. Further, petitioner asserts that if Channel 230A is substituted for Channel 230C3 at Bastrop, it would enable Station KTRY-FM to provide service to 40,426 persons in 2,671.9 square kilometers, representing an increase of 6,330 persons in 922.6 square kilometers. Alternatively, petitioner adds that if Channel 230C3 is retained at Bastrop, it would provide service to 180,307 persons in 4,808.6 square kilometers from the suggested reference site, representing an increase of 146,211 persons over Station KTRY-FM's current Class A authorization.³

²(...continued)

232A at Bastrop. Such action is particularly compelling in this instance as Channel 232A at Bastrop is now short-spaced to the licensed authorization of Station WBAD(FM), Channel 232A, Leland, Mississippi, at coordinates 33-24-55 and 90-59-18, as well as to the construction permit for Channel 232C2 at its licensed site (File No. BPH-930120IB). Consequently, Station KTRY-FM must decide in response to this Notice whether it will pursue a modification to Channel 230C3 at Bastrop at the site suggested herein, or be modified to equivalent Channel 230A at that community. In either event, Channel 232A will be removed from the FM Table of Allotments at Bastrop.

³Petitioner also advises that while the present Channel 230C3 allotment site would provide service to 102,259 persons within Station KTRY-FM's 1 mv/m contour, the suggested site restriction location 7.1 kilometers (4.4 miles) southwest of Bastrop would provide an additional increase in population of approximately 80,000 persons.

4. In light of the above, we believe the proposal warrants consideration since the allotment of Channel 229C2 at Monticello, Arkansas, would enable Station KHBM-FM to provide an expanded service to its community of license and surrounding areas. A staff engineering analysis has determined that Channel 229C2 can be allotted to Monticello at the petitioner's proposed site located 23.3 kilometers (14.5 miles) northeast of the community at coordinates 33-43-44 and 91-34-02, provided vacant Channel 230C3 at Bastrop, Louisiana, is site restricted 7.1 kilometers (4.4 miles) southwest at coordinates 32-43-25 and 91-56-56. We note that the petitioner's suggested reference location for vacant Channel 230C3 is at a different site than KTRY-FM's license authorization on Channel 232A at Bastrop. However, as Station KTRY-FM would be required to move in any event to implement an upgrade on Channel 230C3, we do not view this option as constituting a forced relocation. See Greenville, Texas, 6 FCC Rcd 6048 (1991).

5. Additionally, as Station KTRY-FM previously requested and was granted a modification to Channel 230C3, our tentative view is that we do not believe its default in complying with the terms of the construction permit should now place a reimbursement requirement on the petitioner herein under the principles of Circleville, Ohio, 8 FCC Rcd 159 (1967), in the event Station KTRY-FM chooses to renew this option.⁴ Although Station KTRY-FM must vacate Channel 232A in any event, it is undisputed that the petitioner will benefit from the change in frequency for the Bastrop station. In recognition thereof, the petitioner has expressed a willingness to reimburse Station KTRY-FM for the reasonable costs associated with relocating to Channel 230A at its currently authorized site, if that option is selected. See, Lonoke, Arkansas and Clarksdale, Mississippi, 6 FCC Rcd 4861 (1991). We solicit comments on this issue.

6. We shall also direct an Order to Show Cause to Jamie Patrick Broadcasting, Ltd., licensee of Station KTRY-FM, Channel 232A, Bastrop, Louisiana. However, this is not a traditional Order to Show Cause pursuant to Section 1.87 of the Commission's Rules. As recited above, in view of the background surrounding the Bastrop allotment, the licensee of Station KTRY-FM is required to vacate Channel 232A, as it must be deleted from the FM Table of Allotments. Therefore, Jamie Patrick Broadcasting, Ltd. is required to choose unequivocally now which option it will pursue in response to this Order to Show Cause. Failure to respond will result in a downgrade of the current vacant allotment of Channel 230C3 to Channel 230A at Bastrop to coincide with Station KTRY-FM's current operating facilities, and Station KTRY-FM's license will be modified accordingly.

7. In view of the above, we seek comments on the optional amendments to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, as follows:

⁴Due to spacing constraints to Station KTRY-FM's licensed operation on Channel 232A at Bastrop, vacant Channel 230C3 at that community is unavailable to other interested parties.

<u>City</u>	<u>Option I</u>	
	<u>Present</u>	<u>Channel No.</u> <u>Proposed</u>
Monticello, Arkansas	228A, 260C3	229C2, 260C3
Bastrop, Louisiana	230C3, 232A, 247A, 261C2	230A, 247A, 261C2

<u>Option II</u>		
Monticello, Arkansas	228A, 260C3	229C2, 260C3
Bastrop, Louisiana	230C3, 232A, 247A, 261C2	230C3, ⁵ 247A, 261C2

8. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Jamie Patrick Broadcasting, Ltd., licensee of Station KTRY-FM, Bastrop, Louisiana, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 230A at Bastrop, Louisiana.

9. Jamie Patrick Broadcasting, Ltd. may, not later than June 21, 1999, file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. If no written statement is filed by the date referred to above, Jamie Patrick Broadcasting, Ltd.. will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission to that effect.

10. IT IS FURTHER ORDERED, That the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order by Certified Mail, Return Receipt Requested, to the following:

Jamie Patrick Broadcasting, Ltd. 328 West Madison Avenue Bastrop, LA 71220 (Licensee of Station KTRY-FM)	and	Community Radio Network, Inc. 539 W. Gaines Monticello, AR 71655 (Proposed assignee of Station KHBM-FM)
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11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are

⁵This option contemplates a change in the reference coordinates only for existing Channel 230C3 at Bastrop.

incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before June 21, 1999, and reply comments on or before July 6, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW., Washington, D.C.